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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1940

No. 898

INDEPENDENT WAREHOUSES, INC.,
Self-Insured Employer,
Petitioner,

vs.

REGINA CELESTE DIMINO, widow, on behalf of herself and minor child, JOSEPH LAWRENCE DIMINO, on account of the death of JOSEPH DIMINO, deceased, and STATE INDUSTRIAL BOARD OF THE STATE OF NEW YORK,
Respondents.

PETITION AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE THIRD JUDICIAL DEPARTMENT.

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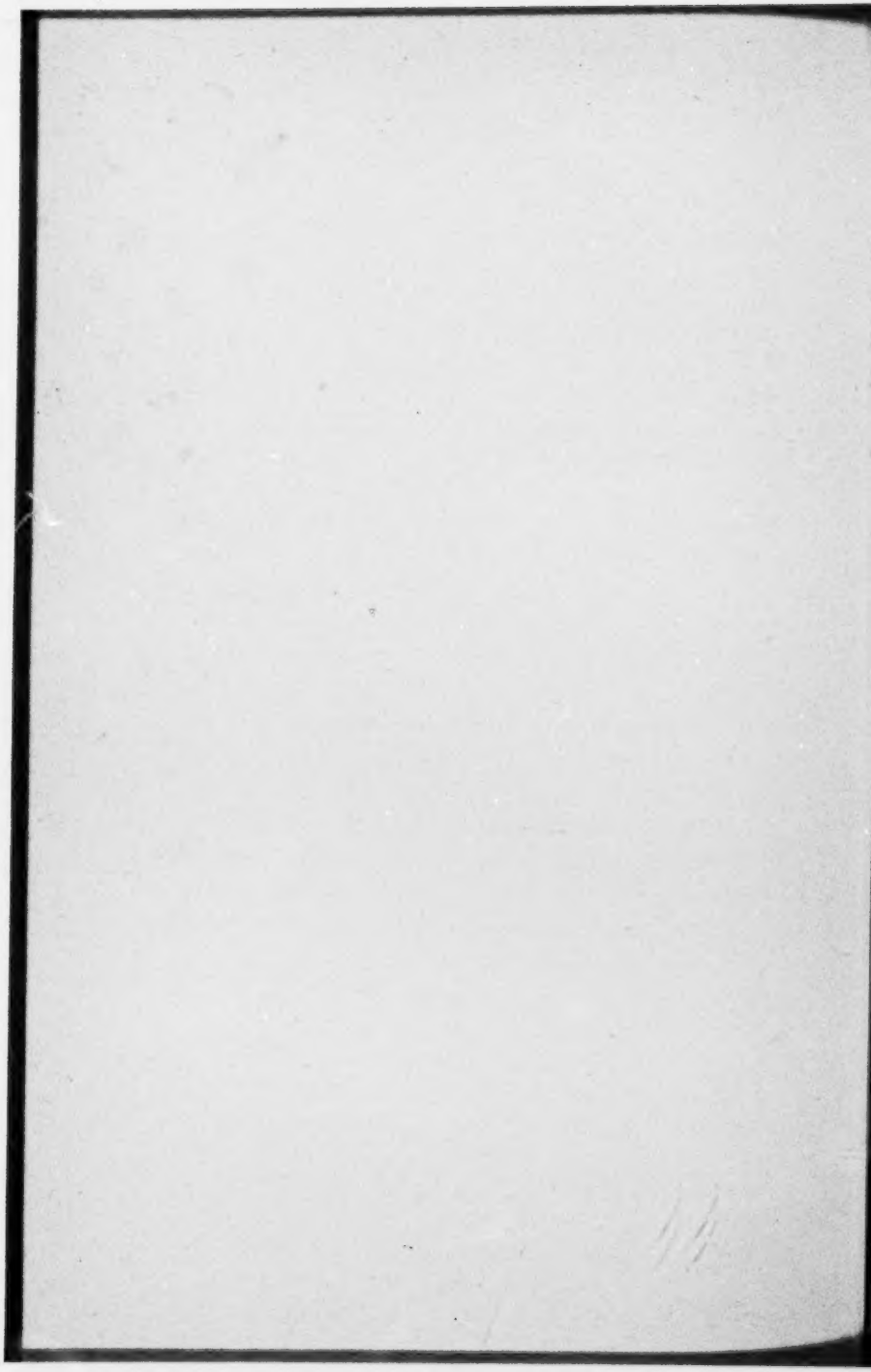

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Supreme Court of the United States

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REGINA CELESTE DIMINO, widow, on behalf of herself and minor child, JOSEPH LAWRENCE DIMINO, on account of the death of JOSEPH DIMINO, deceased, and STATE INDUSTRIAL BOARD OF THE STATE OF NEW YORK,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE THIRD JUDICIAL DEPARTMENT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, INDEPENDENT WAREHOUSES, INC., Self-Insured Employer, a corporation organized under the laws of the State of New York, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above entitled cause in the office of the Clerk of said Court on December 31, 1940 (R. 79) (284 N. Y. 481),

reversing the order of the Appellate Division of the Supreme Court of the State of New York for the Third Judicial Department, entered on June 25, 1940 (R. 73) (259 App. Div. 942), which reversed the award of the State Industrial Board of the State of New York, entered on September 6, 1939 (R. 9), and the awards of the State Department of Labor, Bureau of Workmen's Compensation, entered on April 1, 1939 (R. 6, 7), awarding disability and death benefits to Regina Celeste Dimino, Respondent, on behalf of herself and minor child, Joseph Lawrence Dimino, on account of the death of Joseph Dimino, deceased.

Pursuant to the Remittitur of the Court of Appeals, entered on December 31, 1940 (R. 79), the records and proceedings in that Court were remitted to the Appellate Division of the Supreme Court of New York, Third Judicial Department, where an order on the Remittitur of the Court of Appeals was duly entered on January 28, 1941 (R. 80), and where the said record now remains. The State Industrial Board of New York entered an order on the Remittitur of the Appellate Division of the Supreme Court of New York, Third Judicial Department, on February 26, 1941 (R. 81).

Statement of Facts

Independent Warehouses, Inc., the Employer-Petitioner, (a corporation which transacts business in the New England, Middle Atlantic, Middle Western and Southern States) not only engages in warehousing operations, but also has charge of the operation of Pier 68, East River (a navigable river) in New York City. At said pier, Petitioner orders the number of stevedores needed to unload the ships (R. 33) and supervises the order and manner of unloading of newsprint rolls from the ships

(R. 37, 43-45, 55, 57, 60), performs the moving of said rolls from the stringpiece of the pier to trucks (R. 32) and the dispatch of said trucks (R. 31). Said trucks are owned and operated by United States Trucking Corporation (R. 40) (which is engaged in interstate transportation and which is a corporation affiliated with Independent Warehouses, Inc.). The ships arriving at said Pier 68, East River, are the "Malang", which comes from Bucksport, Maine, and the "Markland", which comes from Liverpool, Nova Scotia (R. 33, 34, 59). A ship would arrive at said pier each week loaded with newsprint rolls (R. 60) (destined for various newspapers in New York City, Hoboken, N. J., Jersey City, N. J., and New Brunswick, N. J.). Joseph Dimino, deceased employee, was employed by Independent Warehouses, Inc., as Pier Superintendent of said pier and had charge of the operation there on behalf of said company (R. 48, 59). Prior to the arrival of a ship, Dimino would receive a copy of the ship's plan, showing in which hatches of the ship the various newsprint rolls were located (R. 33, 34, 59), and the ship's manifest, which gave the number, weight and size of the newsprint rolls on the ship (R. 36-37). Dimino would then telephone the various newspapers and receive their orders (R. 33). He would then determine and order the number of stevedores needed to unload the ship (R. 33) and would also order the number of trucks required for transportation of the rolls (R. 33). The stevedores who unloaded the ships did so under the supervision of Dimino (R. 43-45, 55, 57). Dimino gave orders to the stevedores as to the order in which the hatches on the ship were to be unloaded (R. 37, 60). He also told the stevedores in what order the rolls were to be unloaded from the ship (R. 55, 57). The stevedores would not unload any of the newsprint rolls until they received orders from Dimino (R. 45, 55, 57). Dimino frequently was obliged to go on the ships to look into

the hatchways, whenever there was a delay in the unloading, to learn the reason for such delay (R. 48, 61). Dimino also conferred with the Mate of the ship whenever there was a delay in unloading (R. 49). In the course of his duties, Dimino often had to go on the ships to ascertain the location of the various newsprint rolls in the hatches, to see what rolls were in a position to be unloaded next and to ascertain what rolls were still in the various hatches of the ship (R. 36, 51, 52). Dimino's duties were not confined to the pier, but frequently compelled him to go on board the ship to perform his work (R. 48-49, 50, 57, 61). The information sought by Dimino upon the ship was not available on shore (R. 36, 50, 52). Whenever there were any changes in orders for newsprint rolls, Dimino would instruct the stevedores to change the manner of unloading accordingly (R. 37). It was testified that on September 27, 1938, he went on the ship, "Malang", and walked down a ladder into the hold of the ship to ascertain the number of rolls and the position of certain rolls in the hatch; that he examined certain rolls in one hatch and that while walking across the top of the hatchway to look for other missing rolls, he fell into the hatchway and sustained injuries resulting in his death on October 6, 1938 (R. 50).

Questions Presented

1. Whether the Employer-Petitioner may be held liable under the Workmen's Compensation Law of the State of New York to the widow and minor child of Joseph Dimino, for the death of Joseph Dimino, a Pier Superintendent, whose duties required him to order the number of stevedores needed to unload ships and to instruct the stevedores as to the manner and order of unloading said ships in navigable waters, and who re-

ceived fatal injuries while on one of said ships, in the performance of duties which compelled him to go on board said ship, and which were connected with and facilitated the unloading of said ship.

2. Whether Joseph Dimino was engaged in a maritime service on board a vessel in navigable waters at the time he sustained fatal injuries, which determination would deprive the State Industrial Board of jurisdiction and make Federal or Admiralty jurisdiction applicable to said case.

3. Whether the conclusions of fact of the State Industrial Board, as approved by the Court of Appeals of New York, to the effect that Dimino at the time he received his injuries, was not engaged in performing any work of a maritime character or nature and that said work bore no relation to navigation but was a matter of local concern, were unsupported by the evidence, and thus resulted in depriving Petitioner of a Federal right, by the determination that the State Industrial Board had jurisdiction of the case.

4. Whether the finding or conclusion of fact of the State Industrial Board, as approved by the Court of Appeals of New York, to the effect that Joseph Dimino had no direct supervision or control of the stevedores was unsupported by the evidence, and thus resulted in depriving Petitioner of a Federal right, by the determination that the State Industrial Board had jurisdiction of the case.

5. Whether the finding or conclusion of fact of the Court of Appeals of New York (which was contrary to the finding of the State Industrial Board) to the effect that there was nothing in the Record to show that the

information sought by Dimino upon the ship was not available on shore, was unsupported by the evidence and thus resulted in depriving Petitioner of a Federal right, by the determination that the State Industrial Board had jurisdiction of the case.

6. Whether the assertion of jurisdiction over the case by the State Industrial Board, as approved by the Court of Appeals of New York, is not contrary to the decisions of the United States Supreme Court and the lower United States Courts.

7. Whether the judgment of the Court of Appeals deprived Petitioner of its rights under Article I, Section 8, and Article III, Section 2, of the Constitution of the United States of America and under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A., Sec. 903 (a), and whether said judgment was in violation of said provisions.

Rulings of the Courts Below

The State Department of Labor, Bureau of Workmen's Compensation, and the State Industrial Board of the State of New York made awards of disability and death benefits to Respondent, Regina Celeste Dimino (R. 6, 7, 9). The State Industrial Board found that at the time of his injuries, Dimino was not engaged in performing work of a maritime nature and that said work bore no relation to navigation, but was a matter of local concern; and that Dimino had no direct supervision or control of the stevedores; and that his presence on the ship was incidental to his employment on the dock and arose out of problems connected with such work (R. 4). The State Industrial Board also found that it was necessary for Dimino to board the ship to

perform his duties, as that was the only way he could ascertain the amount and location of certain rolls on the ship (R. 15).

Petitioner appealed to the Appellate Division of the Supreme Court of New York, Third Judicial Department, which Court by an order, entered June 25, 1940, reversed the awards of the State Industrial Board and dismissed the claims on the ground that Dimino was engaged in a maritime service on navigable waters at the time of his injuries and thus the State Industrial Board had no jurisdiction (R. 73). Presiding Justice Hill and Justices Bliss, Schenck and Foster concurred in the decision; while Justice Crapser dissented (R. 72) (259 App. Div. 942).

Respondents appealed to the Court of Appeals of the State of New York, which Court by an order, entered December 31, 1940, reversed the order of the Appellate Division of the Supreme Court, Third Judicial Department, and affirmed the awards of the State Industrial Board (R. 79). The opinion was given by Judge Loughran, and was concurred in by Judges Finch, Rippey, Sears and Lewis. However, Chief Judge Lehman and Judge Conway dissented (R. 76) (284 N. Y. 481). The Court held that the State Industrial Board had jurisdiction over the case and that the State Industrial Board was correct in finding that Dimino had no direct supervision or control of the stevedores (R. 77), and that Dimino at the time of his injuries was not engaged in performing any work of a maritime nature and said work bore no relation to navigation, but was a matter of local concern (R. 78). The Court also stated that there was nothing in the record to show that the information sought by Dimino upon the ship was not available on the shore (R. 77).

Jurisdiction

Jurisdiction is conferred upon this Court to review the judgment of the Court of Appeals of the State of New York by:

Judicial Code, Section 237 (b), 28 U. S. C. A. Sec. 344 (b) (Appendix);

Constitution of the United States of America, Article III, Section 2 and Article I, Section 8, (Appendix);

Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A., Sec. 903 (a), (Appendix).

The judgment of the Court of Appeals of the State of New York, entered on December 31, 1940, (R. 79) is final and is the judgment of the highest court of the State of New York in which a decision in this matter could be had. This petition for a Writ of Certiorari is filed with this Court within the period prescribed in *28 U. S. C. A., Sec. 350.*

The Court of Appeals, in reversing the order of the Appellate Division of the Supreme Court, Third Judicial Department, and affirming the awards of the State Industrial Board, held that Joseph Dimino, deceased, at the time he sustained his fatal injuries, was not engaged in performing any work of a maritime nature; that said work bore no relation to navigation, but was a matter of local concern; and that the State Industrial Board had jurisdiction (R. 78) (284 N. Y. 481). The Appellate Division of the Supreme Court of New York, Third Judicial Department, in reversing the awards of the State Industrial Board and dismissing the claims, held that Dimino was engaged in a maritime

service on navigable waters at the time of his injuries and thus the State Industrial Board had no jurisdiction (R. 73) (259 App. Div. 942). The State Industrial Board found that at the time of his injuries, Dimino was not engaged in performing work of a maritime nature and that said work bore no relation to navigation, but was a matter of local concern (R. 4).

The Petitioner's contention, urged from the inception of this proceeding before the State Industrial Board, and before the Appellate Division of the Supreme Court and the Court of Appeals, was that the case did not fall within the jurisdiction of the State, but came under Federal or Admiralty jurisdiction, since Dimino was engaged in work of a maritime nature on a vessel in navigable water at the time of his injuries (R. 11-14, 21, 24, 26, 29, 53, 66-69).

The decision of the question of whether Dimino was a maritime employee or not, and whether his case came under the jurisdiction of New York State or under Federal jurisdiction was necessary to the determination of said case (R. 4, 11-14, 21, 24, 26, 29, 52-53, 66-69, 73, 76). Said question was actually decided by the Court of Appeals (R. 76), and there was no non-Federal ground broad enough to sustain said judgment.

The above facts show that questions of Admiralty and Federal jurisdiction are necessarily involved in this case and that this Court has jurisdiction to review the judgment of the Court of Appeals under the statutory and constitutional provisions above cited. Said judgment deprived Petitioner of a Federal right.

In its briefs and argument before the Appellate Division of the Supreme Court and the Court of Appeals, Petitioner claimed that the following Conclusions of Fact of the State Industrial Board were unsupported by the

evidence; (a) That at the time of his injuries, Dimino was not engaged in performing any work of a maritime nature and said work bore no relation to navigation, but was a matter of local concern; (b) That Dimino had no direct supervision or control of the stevedores. Said conclusions of fact were also found by the Court of Appeals. The State Industrial Board found that it was necessary for Dimino to board the ship in order to perform his duties (R. 15), while the Court of Appeals stated that there was nothing in the record to show that the information sought by Dimino upon the ship was not available on shore (R. 77). Petitioner urged before the State Industrial Board, the Appellate Division of the Supreme Court and the Court of Appeals in briefs and argument that Dimino's duties required him to go on board the ship (R. 66, 68).

The Appellate Division of the Supreme Court by a four to one decision supported Petitioner's contentions and reversed the awards and dismissed the claims (R. 72). The Court of Appeals by a five to two decision reversed the order of the Appellate Division of the Supreme Court and affirmed the awards (R. 76).

A review by this Court of the above findings of fact in the decision of the Court of Appeals is sought, since Federal rights have been denied to Petitioner as a result of said findings, shown by the Record to be without evidence to support them, and since the conclusion of law and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, for this Court to analyze said facts.

Reasons for Granting Writ of Certiorari and Specification of Errors.

1. The Court of Appeals in this case has decided

a Federal question of substance not theretofore determined by this Court. There is no case on record in the United States Supreme Court involving a set of facts such as are contained in this case,—namely, a Pier Superintendent, whose duties required him to order the number of stevedores needed to unload ships and to instruct the stevedores as to the manner and order of unloading said ships in navigable waters, and who received fatal injuries while on one of said ships in the performance of duties which compelled him to go on board said ship, and which were connected with and facilitated the unloading of said ship. Thus the United States Supreme Court in the exercise of its discretion should grant a Writ of Certiorari, in order that this Court may determine this question. This will then settle the law as to such Pier Superintendents, not only in New York City, but also in all parts of the United States.

2. The Court of Appeals decided this case in a way contrary to the applicable decisions of this Court regarding stevedores. Dimino's duties, like a stevedore's, were partly on land and partly on ships in navigable waters. Both Dimino and a stevedore had duties which had to do with the unloading of ships in navigable waters. *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, held that a stevedore's employment is maritime. *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, held that if a stevedore is injured on board a vessel in navigable waters, his case comes within Federal or Admiralty jurisdiction, and cannot come within State jurisdiction.

3. The Court of Appeals decided this case in a way contrary to the applicable decisions of this Court and the lower United States Courts, when it relied for

its decision partly on *Grant Smith-Porter Co.* v. *Rhode,* 257 U. S. 469. Said case was distinguished from a case like the *Dimino* case by *John Baizley Iron Works* v. *Span,* 281 U. S. 222, where the Court said (pp. 230-1): "In *Grant Smith-Porter Co.* v. *Rhode,* supra, claimant when injured was working upon an incompleted vessel—a thing not yet placed into navigation and which had not become an instrumentality of commerce." In the *Dimino* case the vessel, on which he was injured, was completed and was actually in navigation and commerce.

Matter of Doey v. *Howland Co.,* 224 N. Y. 30, certiorari denied, 248 U. S. 574;

Union Oil Co. v. *Pillsbury,* 63 Fed. (2d) 925;

Puget Sound Nav. Co., et al. v. *Marshall,* 31 Fed. Supp., 903 (U. S. District Court, W. D. Washington, N. D., Feb. 8, 1940).

4. The Court of Appeals decided this case in a way contrary to applicable decisions of this Court, and the lower United States Courts, when it relied for its decision partly on *Miller's Indemnity Underwriters* v. *Braud,* 270 U. S. 59. A decision of this Court distinguishes the *Braud* case from the situation presented in the case at bar. *John Baizley Iron Works* v. *Span,* supra, stated (p. 231) that Braud's work had only remote relation to navigation or commerce. *Merchants' & Miners' Transp. Company* v. *Norton,* 32 Fed. (2d) 513, stated (p. 515) that Braud was not injured "upon navigable waters", in the words of the Act of Congress, but under water on land belonging to the State.

5. The Court of Appeals decided this case in a way contrary to applicable decisions of this Court and the lower United States Courts, when it relied for its

decision partly on the case of *Rosengrant* v. *Havard*, 273 U. S. 664,—the facts of which are distinguishable from the *Dimino* case, as is shown by the cases of *Moss Tie Company, et al* v. *Tanner, et al.*, 44 Fed. (2d) 928, and *Norton* v. *Gulf Refining Co.*, 94 Fed. (2d) 380, 381, certiorari denied, 304 U. S. 566.

6. The Court of Appeals decided this case in a way contrary to applicable decisions of this Court and the lower United States Courts, when it held that Dimino's work was a matter of local concern. Dimino's work was closely connected with the unloading of ships and the facilitating of the ships' work, and such duties have been held by the following cases not to be of local concern:

Moss Tie Company, et al. v. *Tanner, et al.*, supra;

Employers' Liability Assurance Corp. v. *Cook*, 281 U. S. 233, 236;

United States Fidelity & Guaranty Co. v. *Lawson*, 15 Fed. Supp. 116, 122;

Northern Coal & Dock Company v. *Strand*, 278 U. S. 142, 144;

Martinson v. *State Industrial Accident Commission*, 60 Pacific (2d) 972, 973, 154 Or. 42, certiorari denied, 300 U. S. 659.

7. The Court of Appeals decided this case in a way contrary to applicable decisions of this Court and the lower United States Courts, when it held that Dimino's work bore no relation to navigation and was not maritime in nature. The following cases hold that the unloading of a ship, or services facilitating the performance by a ship of her duties, have a direct relation to navigation and commerce and are of a maritime nature:

Moss Tie Company, et al. v. *Tanner, et al.*, supra, at p. 930;

Northern Coal & Dock Company v. *Strand*, supra, at p. 144;

Martinson v. *State Industrial Accident Commission*, supra, at p. 973;

Robinson v. *The C. Vanderbilt*, 86 Fed. 785, 789.

8. The Court of Appeals decided this case in a way contrary to the applicable decisions of this Court and the lower United States Courts which hold that th fact that an employee works partly on land and partly on a vessel in navigable waters does not prevent his work from being maritime, if he is injured on a ship in navigable waters.

Employers' Liability Assurance Corp. v. *Cook*, supra, at p. 236;

Norton v. *Gulf Refining Co.*, supra;

Northern Coal & Dock Company v. *Strand*, supra, at p. 144;

Merchants' & Miners' Transp. Company v. *Norton*, supra.

9. A Federal right of the Petitioner has been denied as a result of the following findings by the Court of Appeals, shown by the Record to be without evidence to support them: (1) That Dimino had no direct supervision over the stevedores; (2) That there was nothing in the Record to show that the information sought by Dimino upon the ship was not available on shore (which latter finding is expressly contrary to the finding of the State Industrial Board that Dimino's duties compelled him to go on the ship and that he could not have per-

formed them without going on board the ship). The conclusion of law depriving Petitioner of said Federal right and the above findings of fact are so intermingled as to make it necessary for this Court to analyze the facts, in order to pass upon the Federal question.

10. The judgment of the Court of Appeals deprived Petitioner of its rights under Article I, Section 8, and Article III, Section 2, of the Constitution of the United States of America and under Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A., Sec. 903(a), and said judgment was in violation of said provisions.

11. The Court of Appeals deprived the Petitioner of a Federal right by ruling that the Workmen's Compensation Law of the State of New York (Chap. 615, Laws 1922, as amended) applies to this case.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Appellate Division of the Supreme Court of the State of New York for the Third Judicial Department, commanding said Court to certify and send to this Honorable Court for its review and determination the full and complete transcript of the Record and all proceedings in this case, so that said judgment of the Court of Appeals of the State of New York may be reviewed and reversed by this Honorable Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

INDEPENDENT WAREHOUSES, INC.,
Petitioner.

By JOHN ROSS LAUER,
Attorney for Petitioner.

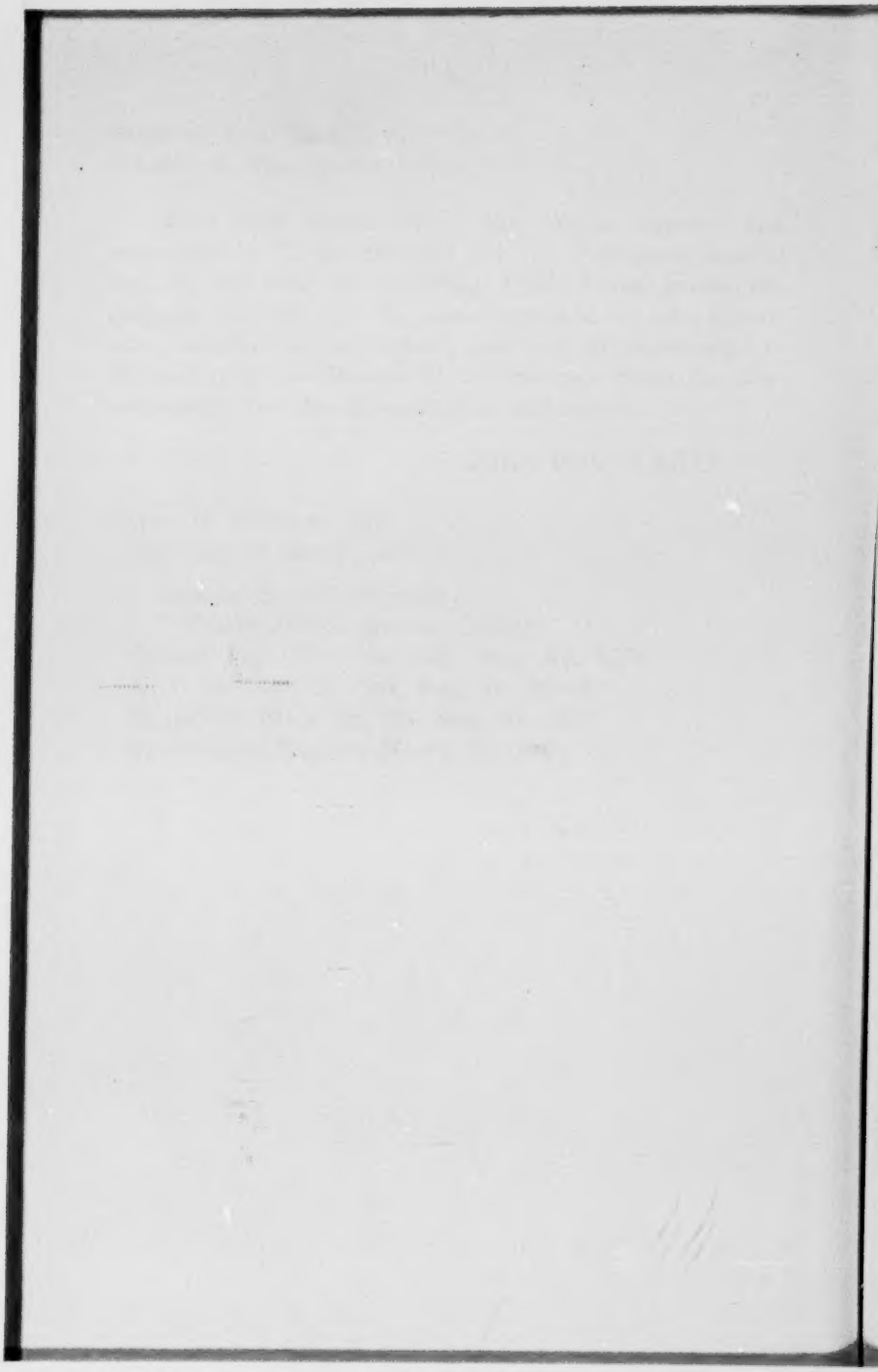
State of New York,
County of New York, ss.:

JOHN ROSS LAUER, being duly sworn, deposes and says that he is the attorney for the Petitioner herein; that he has read the foregoing Petition and knows the contents thereof; that the same is true to his own knowledge, information and belief; and that his knowledge is derived from the Record in the case and from the proceedings in the Courts heretofore had herein.

JOHN ROSS LAUER.

Sworn to before me this
26th day of March, 1941.

EDWARD T. CUNNINGHAM,
Notary Public, Queens County
Queens Co. Clk's No. 442, Reg. No. 2979
N. Y. Co. Clk's No. 764, Reg. No. 2C 460
Kings Co. Clk's No. 195, Reg. No. 2317
Commission Expires March 30, 1942.



BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

The decision of the State Industrial Board of the State of New York appears in the Record at page 15; and the Conclusions of Fact and the Ruling of Law of the State Industrial Board appear in the Record at pages 3-4; and are not elsewhere reported.

The decision of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, is reported in 259 App. Div. 942 and appears in the Record at page 72.

The opinion of the Court of Appeals of the State of New York is reported in 284 N. Y. 481 and appears in the Record at pages 76-78.

Argument

POINT I.

The decision of the Court of Appeals is contrary to the applicable decisions of the United States Supreme Court and is in conflict with those of the lower United States Courts, and is contrary to the General Maritime Law as developed by the United States Supreme Court.

A.

The Decision Is Contrary to the Applicable Decisions of This Court Regarding Stevedores.

The law is firmly established by this Court that a stevedore's work is of a maritime nature. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52. It is settled that if a stevedore is injured on board a vessel in navigable waters, his case comes within Federal or Admiralty jurisdiction and cannot come within State jurisdiction. *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205. Dimino's work, like that of a stevedore had to do with the unloading of ships in navigable waters (R. 43-45, 55, 57). Dimino ordered the number of stevedores needed to unload a ship (R. 33); he told the stevedores when to begin unloading the ship (R. 45, 55, 57) and gave them the order in which to open and unload the hatches (R. 37, 60) and the order in which to remove newsprint rolls from the ship (R. 55, 57); and he would instruct the stevedores to change the manner of unloading, when-

ever he received any changes in orders for newsprint rolls (R. 37). In the course of his duties, he was frequently compelled to go on ships to ascertain the cause of any delay in the unloading thereof (R. 48, 49, 61) and to locate various newsprint rolls in the hatches, to see what rolls were in a position to be unloaded next and to ascertain what rolls were still on the ship (R. 36, 50, 52). In performing these duties on the ship, Dimino secured information which enabled him to determine what directions to give the head stevedore as to the order of unloading the ship. As his work was largely concerned with the unloading of a ship in navigable waters, it was of a maritime nature. Since Dimino was fatally injured on a ship in navigable waters while doing work of a maritime nature which facilitated the unloading of said ship (R. 50), his case comes within Federal or Admiralty jurisdiction.

B.

The Decision Is Contrary to the Applicable Decisions of This Court and the Lower United States Courts Which Hold That the Fact That Part of an Employee's Duties Are on Land Does Not Prevent His Work From Being Maritime in Nature.

Although a stevedore's work may be entirely or partly on land, it is well settled that his employment is maritime in nature. If he is injured on land, his case comes under State jurisdiction. *State Industrial Commission* v. *Nordenholt Corp.*, 259 U. S. 263. If he is injured on a ship in navigable waters, his case comes under Federal jurisdiction. *Southern Pacific Co.* v. *Jensen*, supra. Although part of Dimino's duties were on land, he was injured on board a ship in navigable waters while in the course of his maritime duties connected with the

unloading of said ship and thus his case comes under Federal jurisdiction.

> "The fact that Strand worked for the major portion of the time upon land is unimportant. He was upon the water in pursuit of his maritime duties when the accident occurred."
>
> *Northern Coal & Dock Company* v. *Strand*, 278 U. S. 142, 144.

In *Norton* v. *Gulf Refining Co.*, 94 Fed. (2d) 380, certiorari denied, 304 U. S. 566, McLane was a land employee who worked in a pumphouse on the shore. He was sent to a gasoline barge with bottles to be filled with sample gasoline out of each compartment of the barge, and the samples were to be taken to the laboratory for a test. He was killed by an explosion while on the barge. The Court held that his case came under the Longshoremen's and Harbor Workers' Act, since he was engaged in work of a maritime nature at the time of his death.

See also,

Merchants' & Miners' Transp. Co. v. *Norton*, 32 Fed. (2d) 513;

Employers' Liability Assurance Corp. v. *Cook*, 281 U. S. 233, 236.

C.

The Decision Is Contrary to the Applicable Decisions of This Court and of the Lower United States Courts, in Holding That Dimino's Work Was a Matter of Local Concern.

The fact that Dimino's duties obliged him to be on the pier and aboard vessels which arrived at said

pier in New York City, does not make his contract one of local concern. It is well settled that a stevedore, whose duties are performed on a dock and on a vessel moored at said dock, and who does not go out of the locality, is not engaged in work of merely local concern. The newsprint rolls had been transported by ship from Maine to New York City, where they were destined to go to various newspaper offices in New York City and in cities in New Jersey. Thus the transportation of these rolls was interstate in character and clearly not of local concern. Dimino's work in supervising the unloading of the vessel and facilitating the transportation of the newsprint rolls from the vessel to the newspaper offices was an essential part of the interstate transportation, and, therefore, was not merely of local concern.

> "The unloading of a ship is not a matter of purely local concern as we have often pointed out."
>
> *Employers' Liability Assurance Corp.* v. *Cook*, supra, at p. 236;
>
> *Northern Coal & Dock Company* v. *Strand*, supra, at p. 144;
>
> *Martinson* v. *State Industrial Accident Commission*, 60 Pacific (2d) 972, 973, 154 Or. 42, certiorari denied, 300 U. S. 659;
>
> *United States Fidelity & Guaranty Co.* v. *Lawson*, 15 Fed. Supp. 116, 122.

D.

The Decision Is Contrary to the Applicable Decisions of This Court and the Lower United States Courts, in Holding that Dimino's Work Bore No Relation to Navigation and Was Not Maritime in Nature.

Dimino's work was closely connected with the commerce in which the ship was engaged. It was his duty to see that the newspaper companies were adequately supplied with newsprint rolls (R. 33). To do this he ordered the stevedores to unload the hatches in such wise that the consignees of the paper rolls would best be satisfied (R. 37, 60). He assisted the ship in performing its functions as a carrier, and his work enabled the ship quickly to discharge its cargo for transportation to the consignees. His duties had a direct relation to commerce and were maritime in nature.

> "Such services so rendered to facilitate the performance by a ship of her duties as a carrier have a direct relation to navigation and commerce and are maritime in their nature."
>
> *Moss Tie Company, et al.* v. *Tanner, et al.*, 44 Fed. (2d) 928, 930;
>
> *Northern Coal & Dock Company* v. *Strand*, supra, at p. 144;
>
> *Martinson* v. *State Industrial Accident Commission*, supra, at p. 973;
>
> *Robinson* v. *The C. Vanderbilt*, 86 Fed. 785, 789.

The Referee at the hearing of the case was firmly convinced that Dimino's work was of a maritime character

(R. 52-54). It should be noted that the Court of Appeals stated that "said work bore no relation to *navigation*" (R. 78). It is noteworthy that the Court failed to state that the work bore no relation to *commerce*. At the hearing of the case, the Referee was of the opinion that Dimino's work had a direct relation to commerce, since he assisted in the work of transporting newsprint rolls from the hatches of the ship to the consignees (R. 52).

The case at bar is distinguishable from *P. J. Carlin Construction Co., et al.* v. *Edward Heaney, et al.*, 299 U. S. 41, where a bricklayer was injured while being transported on a boat to an island where he was to work in the erection of a building. His employment did not require any work on navigable waters or work that was connected with navigation or commerce. A case similar to the *Heaney* case and arising out of the same accident is *Matter of Dingfeldt* v. *Albee Godfrey Whale Creek Co.*, 272 N. Y. 623, certiorari denied, 301 U. S. 687.

The decision in the case at bar is in violation of Article I, Section 8 and Article III, Section 2, of the *Constitution of the United States of America* and of the *Longshoremen's and Harbor Workers' Compensation Act*, 33 U. S. C. A., Sec. 903, (a).

E.

The Decision Is Contrary to the Applicable Decisions of This Court and the Lower United States Courts, in That It Relied Partly on Grant Smith-Porter Co. v. Rhode, Which Is Distinguishable.

The Court of Appeals relied for its decision partly on *Grant Smith-Porter Co.* v. *Rhode*, 257 U. S. 469, in which a carpenter was employed on a partially completed vessel lying at dock in a navigable stream. In that

case the Court properly held that the work of constructing a vessel is non-maritime and that the State had jurisdiction. The vessel was not completely built and it was not as yet in navigation or commerce. Furthermore, the Oregon Statute was not compulsory but elective, and the employer and employee had elected to submit to its provisions.

In *John Baizley Iron Works* v. *Span*, 281 U. S. 222, where an employee was injured while repairing a completed ship tied up at a pier in the Delaware River, the Court held that repairing a completed ship in navigable waters was directly connected with navigation and commerce, and said (pp. 230-1):

> "In *Grant Smith-Porter Co.* v. *Rhode*, supra, claimant when injured was working upon an incompleted vessel—a thing not yet placed into navigation and which had not become an instrumentality of commerce."

Since Dimino was injured while performing work of a maritime nature on board a completed vessel in navigable waters, which was engaged in navigation and commerce, this case comes under the Longshoremen's and Harbor Workers' Compensation Act.

Matter of Doey v. *Howland Co.*, 224 N. Y. 30, certiorari denied, 248 U. S. 574;

Union Oil Co. v. *Pillsbury*, 63 Fed. (2d) 925;

Puget Sound Nav. Co., et al. v. *Marshall*, 31 Fed. Supp. 903 (U. S. District Court, W. D., Washington, N. D., Feb. 8, 1940).

F.

The Decision Is Contrary to the Applicable Decisions of This Court and the Lower United States Courts, in That It Relied Partly on Miller's Indemnity Underwriters v. Braud, Which Is Distinguishable.

In its decision, the Court of Appeals relied partly on *Miller's Indemnity Underwriters* v. *Braud,* 270 U. S. 59, in which a diver was suffocated while engaged in cutting timbers under water from an abandoned state of way. The Court held that the State had jurisdiction. The diver was not engaged in navigation or commerce, which fact is pointed out by this Court in *John Baizley Iron Works* v. *Span,* supra, at p. 231:

> "In *Miller's Indemnity Underwriters* v. *Braud,* 270 U. S. 59, the decedent met his death while cutting off piles driven into the land under navigable water. This had only remote relation to navigation or commerce."

Furthermore, the diver was not "upon navigable waters", within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, and he was working under water on land belonging to the State, as was pointed out in the case of *Merchants' & Miners' Transp. Co.* v. *Norton,* supra, at page 515:

> "In the Braud Case, for illustration (in which the state law statute was held to be applicable) the locality of the happening was not, in the words of the Act of Congress 'upon navigable waters'. The decedent was at the time at the work of sawing off timbers which were (although under water) on land belonging to the state."

G.

The Decision Is Contrary to the Applicable Decisions of This Court and the Lower United States Courts, in That It Relied Partly on Rosengrant v. Havard, Which Is Distinguishable.

The Court of Appeals relied partly for its decision on the case of *Rosengrant* v. *Havard,* 273 U. S. 664, in which deceased was employed as a lumber inspector, checker and grader, whose duties were to grade and tally lumber which was being removed from barges into the planing mill of his employer. He was standing on a moored vessel checking lumber being unloaded from a barge alongside, when he was injured. The Court held that the State had jurisdiction. The basis of the Court's decision in the *Rosengrant* case was pointed out in the decision of *Norton* v. *Gulf Refining Co.,* supra, where the Court distinguished the *Rosengrant* case as follows (p. 381):

> "In that case Rosengrant was a lumber checker, employed by a company which had a lumber yard, and his checking of the lumber could as well have been done on shore after the lumber left the vessel. There was no necessity for his going on the barge."

It should also be noted that at the time Rosengrant was injured, he was standing on a moored vessel, but not on the barge which was being unloaded. His work had nothing to do with the vessel on which he was standing. Since he could have checked and graded the lumber on the shore just as well, and since he had no duties which necessitated his going on the barge, nor any duties connected with the unloading of the vessel, his work was not of a maritime nature.

Another case which shows the distinction between the case at bar and the *Rosengrant* case is *Moss Tie Company, et al.* v. *Tanner, et al.*, supra, in which Tanner was employed to stencil marks on cross-ties which had been transported on a barge to the side of a steamer. He was on the barge marking the cross-ties, which were then loaded from the barge to the steamer by stevedores. The Court held that Tanner was entitled to Federal Compensation as a maritime employee.

The case at bar is distinguishable from the *Rosengrant* case, since Dimino's duties required him to go frequently on board the ships to look into the hatchways, whenever there was a delay in unloading, to ascertain the location of the various rolls in the hatches, to see what rolls were in position to be unloaded next and what rolls were still on the ship. Such work could only have been done on shipboard. His duties were closely connected with the unloading of the ship, as he ordered the necessary number of stevedores and gave them instructions as to the manner and order of unloading the ship.

II.

There Is No Evidence to Support the Finding of Fact of the Court of Appeals to the Effect That There Is Nothing in the Record to Show That the Information Sought by Dimino Upon the Ship Was Not Available on Shore.

The Court of Appeals made the following finding of fact: "There is nothing in the Record to show that the information sought by Dimino upon the ship was not available on shore" (R. 77). Said finding of fact is contrary to the finding of fact of the State Industrial Board in its decision (R. 15), which states in part:

> "Apparently due to uncertainty as to amount and location of certain size rolls remaining on board ship, decedent found it necessary to board such ship for personal inquiry and investigation. There is nothing to indicate his knowledge could be conclusively secured otherwise. In conducting such inquiry he fell into a partly closed hatchway. The record indicates it was not unusual for him to have to board vessel for similar purpose and that there was no prohibition on such practice" (R. 15).

In fact, in its own decision the Court of Appeals admits that Dimino did have to go on board the ship:

> "Mr. Dimino frequently was *obliged* to get on board of ship, whenever there was a delay in unloading; he always went on board to find out cause of the delay. He often went on the ship to find out where the different newsprint rolls were and also what their position in the hatches were so he could see where the rolls could be unloaded best" (R. 77).

The word, "obliged", used by the Court of Appeals, shows that it was necessary for Dimino to go on board the ship.

The Record is without evidence to support the finding of fact of the Court of Appeals. In fact, the Record clearly shows that Dimino had to go on board the ship to secure the information he desired.

Frederick Grenvich, a witness for Respondent, in describing the accident, stated (R. 50):

> "A. I was getting relief at that moment and

he (Dimino) was talking to the stevedore on the dock about how many rolls were left on the ship of a certain size, Long Island Star. He wanted to know how many were left on the ship.

A. (Cont'g:) The stevedore looked at the plans and both looked at the plan and did not get an exact answer, and told him to walk over and go on the ship. We went on the ship and looked for the hatch boss, and he asked him where the rolls were situated, these particular rolls. So the hatch boss come with us and the hatch was covered and we went through the opening where you go down into the hole of a ship, down a ladder, and the only light we got there was just from the manhole and a little opening you let your body through. We lit matches and we counted the rolls roughly, a rough guess. And then he asked the hatch boss where the rest were, and he told him they were across the hatchway. We were warned that the hatch was open when we went down there and we went looking for the opening and when we went where we thought the hatch opening would be, it was closed, we found the covers on,—and he said at that time 'Let us go, the hatches are closed.' And we went walking across and he just walked into the open hatch" (R. 50).

It is a reasonable inference that Dimino would not have gone to all the trouble of searching through the dark hatchways of the ship for missing rolls, if he could have secured the information on shore.

Ralph Hill, a witness for Respondent, testified:

"Q. So that if there were mixed rolls, two different sizes, say halves and three-quarters, would

you be able to tell from looking at the plans, which was in the front and which was in the rear? A. No, I could not" (R. 35-36).

Frederick Schanches, a witness for Respondent, testified that if the newsprint rolls on the ship were of different sizes, there were three ways in which Dimino could learn their location and which rolls were available first for unloading: (1) by asking the first officer on the boat; (2) If the first officer did not know, by asking the stevedore; (3) If the stevedore did not know, by Dimino's going on the boat to look for himself (R. 61). Schanches also testified that if there was a delay in the removal of paper, Dimino "might have occasion to go on board" to make an investigation as to the cause of the delay (R. 61).

Gus Monnone, chief stevedore, a witness for Respondent, testified:

> "Q. And if Mr. Dimino wanted to give those orders, he had to go on the ship to see you? A. Sometimes. Sometimes he came and see. Sometimes I would be low down and they go on themselves" (R. 57).

Frederick Grenvich also testified that he frequently saw Dimino on the ships; that whenever there was a delay, Dimino would be at a hatchway looking down into it; and that he would confer with the mate of the ship when there was a delay (R. 48, 49).

In fact, Respondent's attorney conceded that Dimino had to go on the boat in the course of his duties to secure the information he needed:

> "Mr. Gardiner: The materiality is this man could not perform his duties unless he knew the condition of these hatches in the tiers; in order

to promise delivery he would have to get on the boat to see for himself. There was no one else to tell him. The ship's plan did not tell him. As this witness said, he cannot tell and neither could his boss, Joseph Dimino tell. He had to go on the ship to find out and if he did not, he had to ask some one else to go" (R. 36).

"Mr. Gardiner: * * * His services, you might even go so far as to say are incidental but I do not. I go further to say it was absolutely necessary for him to go on the boat. He could not perform his task, could not tell the paper companies when he could get the rolls until he knew exactly how the situation stood. He also had to know the cause for the delay in unloading that boat so that he could instruct his men what to do" (R. 52).

Mr. Gardiner: * * * But Mr. Dimino had to go on the boat. He had to know the exact location" (R. 52).

A Federal right of the Petitioner has been denied as a result of the above finding of fact of the Court of Appeals which is shown by the Record to be without evidence to support it. The conclusions of law depriving Petitioner of said Federal right and the above finding of fact are so intermingled as to make it necessary for this Court to analyze the facts, in order to pass upon the Federal question.

Creswill v. *Grand Lodge Knights of Pythias of Georgia*, 225 U. S. 246, 261;

Truax v. *Corrigan*, 257 U. S. 312;

Chicago, M. & St. P. Ry. Co. v. *Coogan*, 271 U. S. 472.

I.

There Is No Evidence to Support the Finding of Fact of the Court of Appeals to the Effect That Dimino Had No Direct Supervision of the Stevedores.

The Court of Appeals found that Dimino had no direct supervision or control of the stevedores (R. 77). The Record is without evidence to support said finding. In fact, the uncontradicted testimony in the Record is to the effect that Dimino gave the stevedores instructions as to when to start to unload the ship, and as to the order of unloading the hatches and the order in which various rolls were to be taken from the ship. That Dimino had supervision of the stevedores is shown by the following testimony.

Ralph Hill, a witness for Respondent, testified:

> "Q. Would you say he did not have anything to do with it? Did he have anything to say which particular order was to come out first or the order in which the shipment was to come out? A. Yes, he gave them the necessary information; he gave the stevedores the necessary information eight o'clock in the morning.
>
> Q. Well, to that extent he did have some supervision over the unloading? A. Well, he did, yes, sir" (R. 42-43).

> "A. * * * I know Dimino spoke to the stevedores, and told them just what hatches to open up and which ones to work * * *" (R. 37).

> "Q. If there were any telephonic orders, Mr. Dimino would instruct the stevedores, is not that right?
>
> * * * * * * * * * *

A. That is right" (R. 37).

"Q. But his duties were to instruct the head stevedore? A. That is right.

Q. He could tell him what hatches to open? A. That is right" (R. 40).

"Q. And the ship was unloaded under the instructions of Mr. Dimino? A. Yes, sir" (R. 44).

"Q. Would the stevedores or the men on the boat handle any of the merchandise on the boat until they were given orders to do so by Mr. Dimino? A. Mr. Dimino gave the orders to the stevedore, who was in charge of the men on the boat.

Q. I understand. The source of all the unloading, the information as to where it was to go and what it was that was to be done— A. Came from Mr. Dimino" (R. 45).

* * * * * * * * *

"Q. What you mean to say is that insofar as the physical part of removing the merchandise, Mr. Dimino had nothing whatsoever to do with that? A. No, sir.

Q. But he did give the instructions, the oral instructions to the stevedore? A. That is right.

Q. Not as to how they were to do it but just what work they were to do? A. Right" (R. 45).

Gus Monnone, the chief stevedore, a witness for Respondent, testified:

"Q. Now, on the date Mr. Dimino was injured, did he direct you as to what rolls he wanted taken off the ship? A. First thing in the morning" (R. 55).

"A. * * * I get the orders from him every morning anytime there is paper and there is such a kind of paper, I give it to him" (R. 57).

"Q. After Mr. Dimino gave you your orders in the morning did you go board the ship? A. I go on board the ship, every ship.

Q. After you got your orders? A. That is my duty" (R. 57).

Frederick Schanches, a witness for Respondent, testified that Dimino's first duty was to instruct the head stevedore as to which hatches he intended to work first (R. 60).

This Court in its discretion should review said finding of fact, since there was no evidence to support it and it resulted in the denial of a Federal right of Petitioner's. Said finding of fact is so intermingled with the conclusion of law of the Court of Appeals denying a Federal right to Petitioner, that it is necessary for this Court to analyze said facts for the purpose of passing upon the Federal question involved.

The decision of the Court of Appeals will cause future uncertainty on the question presented by this case, as it is out of harmony with the sound principles of maritime law established by this Court. Since the judgment of the Court of Appeals is contrary to the applicable decisions of this Court and is in conflict with the decisions of the lower United States Courts, it is respectfully submitted that this Court should issue a Writ of Certiorari to review said judgment.

POINT II.

The Court of Appeals has decided a Federal question of substance not heretofore determined by this Court.

This Court has not heretofore settled the status of Pier Superintendents, with duties requiring them to order the number of stevedores needed to unload ships and to instruct stevedores as to the manner and order of unloading said ships in navigable waters, and who are injured while on one of said ships in the performance of their duties, which require them to go on board said ship, and which are connected with and facilitate the unloading of said ship. In its decision the Court of Appeals has decided an important Federal question not heretofore determined by this Court. That the question is a puzzling one is shown by the fact that the Appellate Division of the Supreme Court rendered a four-to-one decision in favor of the Petitioner (R. 72), while the Court of Appeals rendered a five-to-two decision in favor of the Respondents (R. 76-78). The Presiding Justice of the former Court and the Chief Judge of the latter Court both decided in favor of the Petitioner (R. 72, 78).

This question should be finally settled by this Court, due to the fact that it is of great nationwide concern. Such final determination by this Court is of the utmost importance to those who operate piers throughout the country. The decision by this Court will settle the law as to such Pier Superintendents and other dock workers with similar duties, not only in New York City, but also in all parts of the United States, and will save much future litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JOHN ROSS LAUER,
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With Him on the Brief.

APPENDIX

A

Judicial Code, Section 237 (b), 28 U. S. C. A. Sec. 344 (b). Appellate jurisdiction of decrees of State courts; certiorari.

"(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on appeal in a case where such a right is conferred by the preceding paragraph; nor shall the act that a review on appeal might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

B

Constitution of the United States of America—Article III.

"Section 2—The judicial Power (of the United States) shall extend * * * to all Cases of admiralty and maritime Jurisdiction."

C

Constitution of the United States of America—Article I.

"Section 8—The Congress shall have Power * * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * * * * * * * * *

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

D

Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. Sec. 903 (a).

"*Sec. 903. Coverage.* (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State Law * * *."

No. 898

APR 22 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

INDEPENDENT WAREHOUSES, INC.,
Self-Insured Employer,
Petitioner,

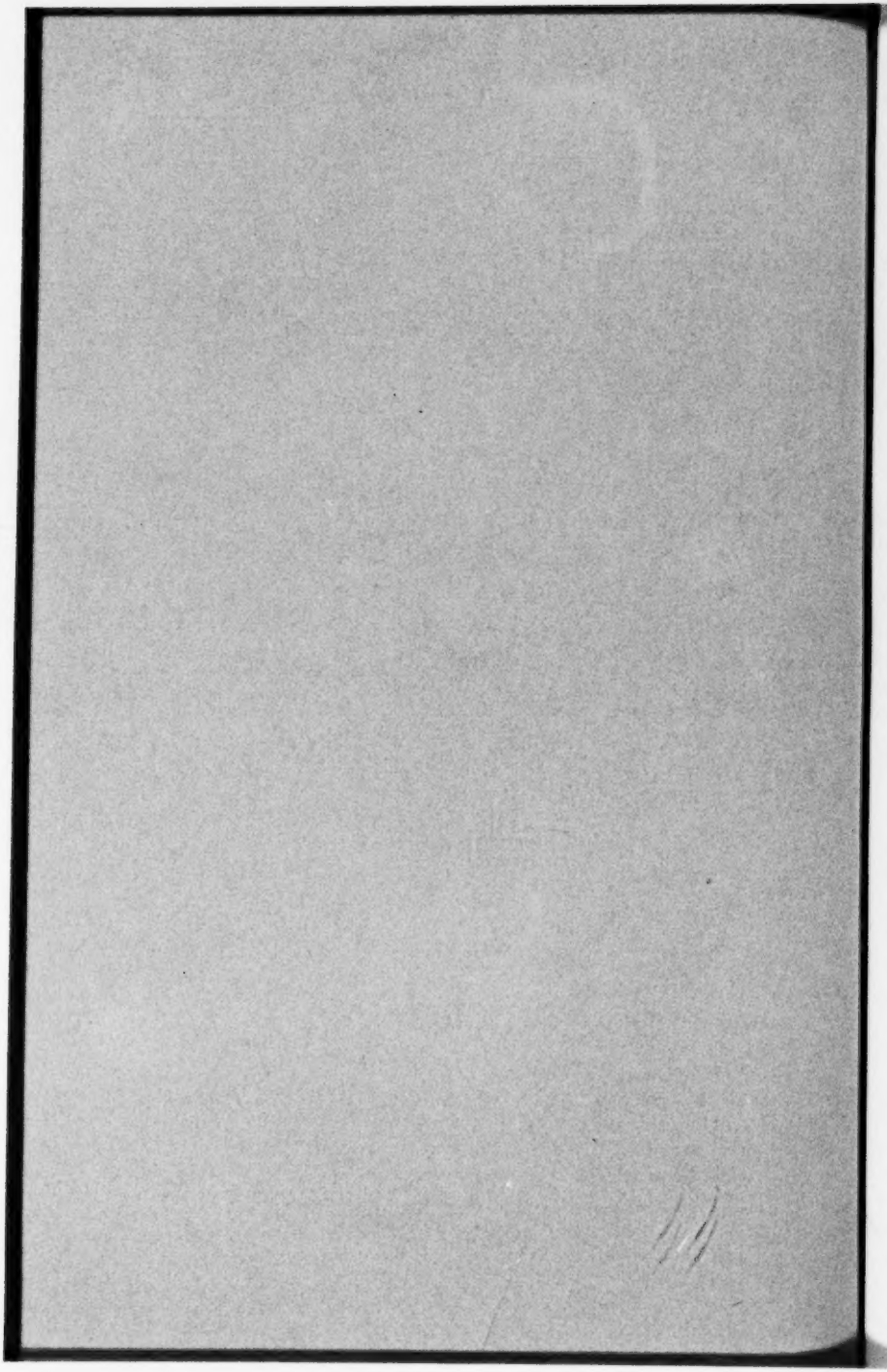
vs.

REGINA CELESTE DIMINO, widow, on behalf of herself and minor child, Joseph Lawrence Dimino, on account of the death of Joseph Dimino, deceased, and STATE INDUSTRIAL BOARD OF THE STATE OF NEW YORK,
Respondents.

BRIEF ON BEHALF OF REGINA CELESTE DIMINO, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WILLIAM L. F. GARDINER,
Counsel for Respondent,
Regina Celeste Dimino.

Court Press, 136 Cedar Street, N. Y. C.



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BRIEF ON BEHALF OF REGINA CELESTE DIMINO, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

Independent Warehouses, Inc., the employer and petitioner herein, was engaged in the warehouse business and maintained, operated and controlled Pier 68, situated at 20th Street, East River, New York City (R. 30).

Joseph Dimino was employed by the employer-petitioner as superintendent of this pier, and had entire charge of the pier (R. 48).

Each week a ship would arrive at this pier with newsprint rolls destined for various newspapers in the city. Before the arrival of a ship, Joseph Dimino would receive a plan of the ship showing the location

of the newsprint rolls on the ship, and also giving the size, weight and other details regarding these rolls (R. 33, 34, 60).

Joseph Dimino would indicate to the independent stevedoring company how many stevedores would be required to unload the ship (R. 33).

He would also advise the United States Trucking Company, an independent contractor which removed newsprint rolls from the pier, to various news plants, the number of trucks that would be needed (R. 33).

On the Monday morning following the arrival of a ship, Joseph Dimino would request the head stevedore to unload the hatches in the order he considered proper (R. 37).

Joseph Dimino went on the ship at times to secure information relative to the performance of his duties on the pier. This information was obtainable on the pier (R. 43).

While he was on the ship endeavoring to obtain certain information relative to his work on the pier he fell down a hatch and sustained injuries which resulted in his death (R. 50).

The work of unloading the cargo of the ship was performed by an independent stevedoring company (R. 42). Such work was supervised by a boss stevedore who was employed by the same concern (R. 60).

Independent Warehouses, Inc., the employer and petitioner herein, was not engaged in the performance of any maritime work and there was no privity between it and the independent stevedoring company that unloaded the cargo of the boat (R. 60).

There was no privity between Independent Warehouses, Inc., the employer and petitioner herein, and the owner of the ship, or the United States Trucking Company which removed the newsprint rolls from the pier.

The State Department of Labor and the State Industrial Board of the State of New York made awards of disability and death benefits to the respondent, Regina Celeste Dimino (R. 6, 7, 9). The State Industrial Board found that at the time of his injuries Dimino was not engaged in performing work of a maritime nature, and the work performed by him bore no relation to navigation but was a matter of local concern. The Board also found that Dimino had no direct supervision or control of the stevedores and that his presence on the ship was incidental to his employment on the dock and arose out of problems connected with such work (R. 4).

The petitioner appealed to the Appellate Division of the Supreme Court of New York, Third Judicial Department, which Court, by an order entered June 25, 1940, reversed the awards of the State Industrial Board and dismissed the claims of the respondent on the ground that Dimino was engaged in a maritime service on navigable waters at the time of his injuries, and that the State Industrial Board had no jurisdiction (R. 73). Presiding Justice Hill and Justices Bliss, Schenck and Foster concurred in the decision, while Justice Crapser dissented (R. 72) (259 App. Div. 942).

An appeal was taken to the Court of Appeals of the State of New York, which Court, by an order dated December 31, 1940, reversed the order of the Appellate Division of the Supreme Court, Third Judicial Department, and affirmed the awards of the State Industrial Board (R. 79). An opinion was rendered by Judge Loughran, and was concurred in by Judges Finch, Rippey, Sears and Lewis; Chief Judge Lehman and Judge Conway dissented (R. 76) (284 N. Y. 481).

The Court held that the State Industrial Board had jurisdiction of the case and that the State Industrial Board was correct in finding that Dimino had no direct supervision or control of the stevedores (R. 77). It further held that Dimino at the time of his injuries was not engaged in performing any work of a maritime nature, and that his work bore no relation to navigation, but was a matter of local concern (R. 78). The Court found that there was nothing in the record to show that the information sought by Dimino upon the ship was not available on the shore (R. 77).

POINT I.

The Court of Appeals of the State of New York expressly followed the rules laid down by the United States Supreme Court in deciding the case at bar.

The petitioner in its brief misapprehends the facts. It seeks to have the law governing maritime services of a stevedore applied to the case at bar.

Neither the petitioner nor its employee, Joseph Dimino, was engaged in work of a maritime nature. The stevedoring work was performed by an independent stevedoring company which had no privity whatever with the petitioner herein nor its employee, Joseph Dimino.

The Court of Appeals in its opinion stated (R. 78):

> "We think the foregoing decisions of the highest court of the nation rule the case in hand and sanction the conclusion of the State Industrial Board that, 'At the time the said Joseph Dimino sustained the accidental injuries which resulted

in his death, he was not engaged in performing any work of a maritime character or nature and said work bore no relation to navigation but was a matter of local concern'."

The first case cited by the Court of Appeals in its opinion is *Grant Smith-Porter Company* v. *Rhode,* 257 U. S. 469. In this case a carpenter, received injuries while at work on a partially completed vessel lying at a dock in a navigable stream and sought recovery under the Workmen's Compensation Law of the State of Oregon. The parties had made contributions under the compensation law of that state. The employer was engaged in constructing steam vessels for the United States Government. At the time of the injuries to the claimant, the vessel that the claimant was working upon had been substantially completed. The Court held that the contract for constructing the vessel was non-maritime, although the vessel was in navigable waters and neither Rhode's general employment nor his activities at the time had any direct relation to navigation or commerce, that the regulation of the rights and obligations of the parties by a local rule did not necessarily work material prejudice to any characteristic feature of the general maritime law or interfere with the proper harmony or uniformity of that law in its international or interstate relations.

Another case cited by the Court of Appeals in its opinion is *Millers' Indemnity Underwriters* v. *Braud,* 270 U. S. 59. In that case the plaintiff's intestate while engaged as a diver by a building company, submerged himself from a floating barge anchored in a navigable river in Texas for the purpose of sawing

off timbers of an abandoned set of ways. While submerged, he was suffocated. Damages for his death were recovered from the employer insurer under the Workmen's Compensation Law of the State of Texas. The employer in appealing to the United States Supreme Court alleged that the claim arose out of a maritime tort; that the rights and obligations of the parties were fixed by the maritime law; and that the state had no power to change those by statute. The Supreme Court, in affirming the award, stated, at page 64:

> "In the cause now under consideration, the record discloses facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend save for the provisions of the State Compensation Act; but the matter is of mere local concern and its regulation by the State will work no material prejudice to any characteristic feature of the general maritime law."

The case at bar is on all fours with the case of *Rosengrant* v. *Havard,* 273 U. S. 664. In this case which is cited in the opinion by the Court of Appeals, the deceased was employed as a lumber inspector, checker and grader. His duties were to grade and tally lumber which was being removed from barges into the planing mill of his employer. He was standing on a moored vessel, checking lumber being unloaded from a barge alongside, when he was injured. In this case neither the employer nor the employee was engaged in performing any maritime service.

The basis of the Court's decision in the *Rosengrant* case was pointed out in the decision of *Norton* v. *Gulf*

Refining Co., 94 Fed. (2nd) 380, where the Court distinguished the *Rosengrant* case as follows (p. 381):

> "In that case Rosengrant was a lumber checker, employed by a company which had a lumber yard, and his checking of the lumber could as well have been done on shore after the lumber left the vessel. There was no necessity for his going on the barge."

In the *Rosengrant* case the employee performed no maritime services. He could have checked and graded the lumber on shore as well. It was not necessary for him to go on the barge. In the case at bar, Joseph Dimino likewise performed no maritime services and he too could have secured the information he needed on the shore since he had no duties connected with the unloading of the boat. His services were not of a maritime nature.

In the *Matter of Heaney* v. *Carlin Construction Company*, 269 N. Y. 93, the claimant was a bricklayer and was injured by an explosion on a boat in navigable waters while being transported to work on an adjacent island. The employer claimed an award of compensation could not be maintained because the maritime law was applicable. The Court of Appeals decided to the contrary, however.

The decision of the Court of Appeals was affirmed in 299 U. S. 41, the court stating at page 44:

> "This Court has often ruled that the maritime law cannot be modified by state enactments so as materially to interfere with its essential uniformity. *State Industrial Commission* v. *Nordenholt, supra.* But this doctrine we think has no

> application in the circumstances here presented. The present attempt is to enforce a liability assumed by an employer and insurance carrier under a non-maritime contract. All the parties, as well as the accident, were within the limits of New York State. The contract had no direct relation to navigation; to enforce it against the parties before us will not materially interfere with the uniformity of any maritime rule. There is no claim against the ship or her owner; their rights are not in issue."

In the case at bar we likewise have an attempt to enforce a liability assumed by the employer under a non-maritime contract. All the parties as well as the accident are within the limits of New York State. The contract of employment has no direct relation to navigation or commerce. To enforce it against the parties herein will not materially interfere with the uniformity of any maritime rule. There is no claim against the ship, the owners thereof or the stevedoring company. Their rights are not in issue.

POINT II.

The petition herein does not disclose facts sufficient to warrant the granting of the writ of certiorari.

The question of law attempted to be raised by the petitioner presents no question that should be reviewed by this court. "However important the case may be to the petitioner the question involved is not one of gravity and general importance. There is no conflict between the decisions of State and Federal Courts or between those of Federal Courts of differ-

ent circuits. There is nothing affecting the relations of this nation to foreign nations and, in addition, no matter of general interest to the public" (*Fields* v. *United States*, 205 U. S. 292, 296).

CONCLUSION.

It is, therefore, respectfully submitted on behalf of the respondent, Regina Celeste Dimino, that the petition for a writ of certiorari herein should be denied.

WILLIAM L. F. GARDINER,
Counsel for Respondent,
Regina Celeste Dimino.

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 898.

INDEPENDENT WAREHOUSES, INC., Self-Insured Employer,

Petitioner,

vs.

REGINA CELESTE DIMINO, widow, on behalf of herself and minor child, JOSEPH LAWRENCE DIMINO, on account of the death of JOSEPH DIMINO, deceased, and STATE INDUSTRIAL BOARD OF THE STATE OF NEW YORK,

Respondents.

BRIEF OF RESPONDENT INDUSTRIAL BOARD OF THE STATE OF NEW YORK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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II.

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May it Please the Court:

Now comes the respondent, Industrial Board of the State of New York, in the above entitled matter, by its counsel, and opposes the petition herein.

Proceedings Below.

This was a proceeding under the provisions of the Workmen's Compensation Law of the State of New

York, on behalf of the widow and minor child of Joseph Dimino, deceased employee, for the awarding and payment of compensation benefits accruing to them by reason of the death of said Joseph Dimino resulting from an accident arising out of and in the course of his employment with the Independent Warehouses, Inc.

Following the filing of a claim for compensation by the widow, on behalf of herself and minor child (R. 22), hearings were held before a referee in the Department of Labor and before a member of the Industrial Board of the State of New York, when evidence establishing the claim of the said dependents was introduced into the record. After consideration of all the evidence, the State Industrial Board made a decision and award under the terms of the Workmen's Compensation Law in favor of said widow and minor child (R. 7, 9).

An appeal was thereupon taken to the Appellate Division of the Supreme Court, Third Judicial Department, State of New York, by the employer, Independent Warehouses, Inc. (R. 2).

Formal Findings of Fact and Conclusions of Law were thereafter executed by three members of the State Industrial Board and served on the parties in interest (R. 3-5).

The Appellate Division of the Supreme Court, Third Judicial Department, by order entered June 25, 1940, reversed the award and dismissed the claim, with one Justice dissenting (R. 72). Thereafter, the Industrial

Board of the State of New York and the claimant appealed to the Court of Appeals (R. 73, 74).

The Court of Appeals on December 31, 1940 ordered and adjudged that the order of the Appellate Division of the Supreme Court, Third Judicial Department, appealed from be reversed and the award of the State Industrial Board affirmed, with two Judges dissenting, and remitted the matter to the said Appellate Division (R. 76-80). On January 28, 1941, the said Appellate Division made the order and judgment of the Court of Appeals its order, reversing its previous order and affirming the findings of the State Industrial Board (R. 80, 81).

Opinions Below.

The decision of a member of the Industrial Board of the State of New York appears in the record at page 15; the Findings of Fact and Conclusions of Law of the Industrial Board of the State of New York executed by three members thereof appear in the record at pages 3 to 5; and are not elsewhere reported.

The decision of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, is reported in 259 App. Div. 942 and appears in the record at page 72.

The opinion of the Court of Appeals of the State of New York is reported in 284 N. Y. 481 and appears in the record at pages 76 to 78.

Statement.

The employer, the Independent Warehouses, Inc., was engaged in the warehouse business (R. 18). It stored newsprint rolls on a pier and facilitated their distribution on trucks to various newspaper plants (R. 31, 32). It is not claimed that the employer owned, chartered or operated any boat or ship.

Joseph Dimino, the deceased employee, was a pier superintendent. His principal duty was to direct the delivery by trucks of newsprint rolls, which had been unloaded from ships onto the pier, and to see that the trucks were loaded for distribution to the various newspaper plants (R. 32, 33).

He supervised and had charge of men employed solely by Independent Warehouses, Inc. (R. 31, 32, 48, 63), checked the sequence of deliveries, and occasionally investigated delays, gave information to the stevedore and conferred with the hatch boss (R. 48-50, 61).

His duties were entirely on the pier (R. 41, 42) and started from the time the paper hit the dock (R. 40).

Incidental to his pier duties, he occasionally went upon the ships for the purpose of locating rolls of paper intended for certain newspaper plants (R. 33, 43, 44, 63). He was not required or compelled to go on board the ship, but evidently found it a matter of convenience or expedient to do so (R. 39, 44).

He had no authority, control or supervision over the stevedores or longshoremen engaged in connection

with the loading and unloading of the ships. He had nothing to do with the loading or unloading of the cargo or with the removal of merchandise from the ships (R. 31, 32, 41, 42, 44, 63). The loading and unloading were supervised and effected by the boss stevedore of another employer, operating independently of Dimino's employer (R. 42, 44, 45, 60).

The decedent was an employee of the Independent Warehouses, Inc. only (R. 18, 42, 48, 60). He had nothing to do with the operation or navigation of the ships (R. 40). He was neither in the service nor under the control of the ships, the owner of the vessels, the stevedore, or the United States Trucking Corporation which hauled the paper rolls from the pier. His activities were in the interest of his employer's customers on land.

While aboard a ship at the pier and while investigating and checking newsprint rolls, Dimino fell into an open hatchway, receiving injuries which resulted in his death (R. 17, 50).

At the time of the hearings, counsel for the petitioner-employer confirmed the fact that the decedent had no connection with the unloading of the vessels and exercised no authority over the stevedores.

> "Q. And the ship was unloaded under the instructions of Mr. Dimino? A. Yes, sir.
> Mr. Lauer: Well, your Honor, that is not correct. The stevedores did the unloading entirely" (R. 44).

Argument.

No federal question of substance is presented in the petition or involved in this case.

The principal issue before the Court of Appeals of the State of New York in the case at bar concerned the question whether the evidence in the record as a matter of law was sufficient to sustain the findings of fact of the Industrial Board of the State of New York.

The State Industrial Board made, among others, the following findings of fact:

> "7. The said Joseph Dimino had no direct supervision or control of the stevedores and the loading and unloading of freight from the ship was performed by another independent stevedoring employer.
>
> The presence of the decedent on the ship was wholly incidental to his employment on the dock and arose out of problems connected with such work" (R. 4).

The Industrial Board also found as follows:

> "6. At the time the said Joseph Dimino sustained the accidental injuries which resulted in his death, he was not engaged in performing any work of a maritime character or nature and said work bore no relation to navigation but was a matter of local concern" (R. 4).

Exclusive jurisdiction to decide questions of fact is conferred on the Industrial Board by the Workmen's Compensation Law of the State of New York. Questions of law only may be considered by the Appellate Courts on appeal in a Workmen's Compensation proceeding. *(Dahlstrom Metallic Door Company,*

et al. v. Industrial Board of the State of New York, 284 U. S. 594, *Iuppa & Battle Company, et al. v. Industrial Board of the State of New York*, 291 U. S. 646, *P. J. Carlin Construction Company, et al. v. Edward Heaney, et al.*, 299 U. S. 41.)

The Court of Appeals held as a matter of law that the findings of the State Industrial Board were amply supported by the evidence in the record (R. 76-78).

Consequently the petitioner's repeatedly alleged facts, constituting the foundation of the petitioner's argument and to the effect that the decedent exercised authority over the stevedores or control over the unloading of ships, or instructed and ordered the stevedores to unload the ships, must be rejected in the consideration of this case.

In the light of the facts disclosed by the record supporting the findings of the Industrial Board, it follows that the decedent was engaged in a non-maritime employment or service, the liability of the employer arose from a non-maritime contract and the matter was entirely of local concern.

Grant Smith-Porter Ship Co. v. Rhode, 257 U. S. 469;

Miller's Indemnity Underwriters v. Braud, 270 U. S. 59;

Rosengrant v. Havard, 273 U. S. 664;

P. J. Carlin Construction Co., et al. v. Edward Heaney, et al., 299 U. S. 41;

Sultan Railway & Timber Co. v. Dept. of Labor & Industries, 277 U. S. 135;

Alaska Packers Association v. Ind. Acc. Commission, 276 U. S. 467.

The petitioner also seeks to present for consideration of this Court an alleged constitutional or federal question in respect to the sufficiency of evidence supporting "the finding or conclusion of fact of the State Industrial Board, as approved by the Court of Appeals of New York, to the effect that Joseph Dimino had no direct supervision or control of the stevedores." It appears sufficient to say that a constitutional or federal question of this nature was never raised or passed upon in any of the Courts below. *(Valley Steamship Co. v. John J. Wattawa,* 244 U. S. 202.)

WHEREFORE, it is respectfully submitted that the petition herein should be denied, or, in the alternative, dismissed.

Respectfully submitted,

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